Supreme Court, U.S.
FILED

971897 MAY 26 1998

OFFICE OF THE CLERK

No. 97-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

VISTA PAINT CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

WILLIAM F. FAHEY
HANNA & MORTON •
THORPE & THORPE
Wilshire-Grand Building
17th Floor
600 Wilshire Boulevard
Los Angeles, CA 90017

CHRISTOPHER LANDAU
Counsel of Record
JEFFREY BOSSERT CLARK
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

Counsel for Petitioners

May 26, 1998

126 pp

QUESTIONS PRESENTED

1. Whether the lower courts erred in holding that § 307(b)(2) of the Clean Air Act precludes a defendant in a civil enforcement action from challenging the validity of the regulation being enforced.

2. Whether the lower courts erred in holding that the Government does not bear the burden of proof for purposes of penalty fact-finding under § 113(e)(1) of the Clean Air Act.

3. Whether the lower courts erred in holding that a summary "trial by affidavit" comports with Fed. R. Civ. P. 43(a) and due process.

PARTIES TO THE PROCEEDING

Petitioner, Vista Paint Company ("Vista"), was appellant-defendant below. Respondent, the United States of America, was appellee-plaintiff below.

Pursuant to this Court's Rule 29.6, petitioner notes that Vista is not the parent or subsidiary of any other corporation. Vista has not issued any shares to the public.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

INTRODUCTION 1

OPINIONS BELOW 2

JURISDICTION 3

PERTINENT STATUTORY PROVISIONS 3

STATEMENT OF THE CASE 4

A. Background of the Alleged Violations 4

B. The First Trial and Appeal 5

C. The Second Trial and Appeal 6

REASONS FOR GRANTING THE WRIT 8

I. The Courts Below Erred in Precluding Vista From Challenging the Validity of a Regulation in a Proceeding to Enforce that Regulation 8

A. Section 307(b)(2) Does Not Preclude Vista's Challenge to the California SIP 9

B. If Construed to Preclude Vista's Challenge to the California SIP, Section 307(b)(2) is Unconstitutional 12

II. The Courts Below Erred in Holding that the Government Does Not Bear the Burden of Proof with Regard to Penalty Factors Under the Clean Air Act 15

III. The Abbreviated Penalty Trial Afforded to Petitioner Did Not Comport with the Federal Rules of Civil Procedure or the Constitution 17

CONCLUSION 20

TABLE OF AUTHORITIES

CASES: **Page**

Abbott Labs. v. Gardner,
387 U.S. 136 (1967) 8

Adamo Wrecking Co. v. United States,
434 U.S. 275 (1978) 9,11-14

Armstrong v. Manzo,
380 U.S. 545 (1965) 12

Ashwander v. TVA,
297 U.S. 288 (1936) 12

Atlantic States Legal Found. v. Tyson Foods,
897 F.2d 1128 (11th Cir. 1990) 15,17

Ball v. Interoceanica Corp.,
71 F.3d 73 (2d Cir. 1995),
cert. denied, 117 S. Ct. 169 (1996) 19

Bank of Nova Scotia v. United States,
487 U.S. 250 (1988) 19

Bellaire Gen. Hosp. v. Blue Cross Blue Shield,
97 F.3d 822 (5th Cir. 1996) 19

Buckeye Power, Inc. v. EPA,
481 F.2d 162 (6th Cir. 1973) 10,11

Carlisle v. United States,
517 U.S. 416 (1996) 19

Chrysler Corp. v. EPA,
600 F.2d 904 (D.C. Cir. 1979) 13

Dolence v. Flynn,
628 F.2d 1280 (10th Cir. 1980) 18

Eccles v. People's Bank of Lakewood Village,
333 U.S. 426 (1948) 20

Edward J. DeBartolo Corp. v.
Florida Gulf Coast Bldg.
& Constr. Trade Council,
485 U.S. 568 (1988) 12

Engle v. Isaac,
456 U.S. 107 (1982) 15

FCC v. Beach Communications, Inc.,
508 U.S. 307 (1993) 16

FPC v. Metropolitan Edison Co.,
304 U.S. 375 (1938) 8

Friends of the Earth v. Carey,
552 F.2d 25 (2d Cir. 1977) 10

General Motors Corp. v. Ruckelshaus,
724 F.2d 979 (D.C. Cir. 1983),
vacated on other grounds,
742 F.2d 1561 (D.C. Cir. 1984) (*en banc*),
cert. denied, 471 U.S. 1074 (1985) 12-13

Getty E. Oil Co. v. Ruckelshaus,
467 F.2d 349 (3d Cir. 1972),
cert. denied, 409 U.S. 1125 (1973) 10

Harrison v. PPG Indus., Inc.,
446 U.S. 578 (1980) 9

Holmes Limestone Co. v. Andrus,
655 F.2d 732 (6th Cir. 1981),
cert. denied, 456 U.S. 995 (1982) 13

Indiana & Mich. Elec. Co. v. EPA,
509 F.2d 839 (7th Cir. 1975) 10

In re Adair,
965 F.2d 777 (9th Cir. 1992) 19

In re Stevinson,
194 B.R. 509 (D. Colo. 1996) 19

Lebeck v. William A. Jarvis, Inc.,
250 F.2d 285 (3d Cir. 1957) 19

Leslie Salt Co. v. U.S.,
55 F.3d 1388 (9th Cir.),
cert. denied, 516 U.S. 955 (1995) 16

Lloyd A. Fry Roofing Co. v. EPA,
554 F.2d 885 (8th Cir. 1977) 10

Lubrizol Corp. v. EPA,
562 F.2d 807 (D.C. Cir. 1977) 10

McNary v. Haitian Refugee Center, Inc.,
498 U.S. 479 (1991) 11

Metropolitan Washington Airports Auth. v.
Citizens for the Abatement of Aircraft Noise, Inc.,
501 U.S. 252 (1991) 1

New England Tel. & Tel. Co. v. Public Util. Comm'n of Me., 742 F.2d 1 (1st Cir. 1984), *cert. denied*, 476 U.S. 1174 (1986) 13

Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986) 17

Phonetele, Inc. v. AT&T, 889 F.2d 224 (9th Cir. 1989), *cert. denied*, 503 U.S. 914 (1992) 19

Public Interest Research Group v. Powell Duffryn Terminals, Inc., 913 F.2d 64 (3d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991) 15

Ross v. Franzen, 777 F.2d 1216 (7th Cir. 1985) 18

Sierra Club v. Cedar Point Oil Co., 73 F.3d 546 (5th Cir.), *cert. denied*, 117 S. Ct. 57 (1996) 15

Speiser v. Randall, 357 U.S. 513 (1958) 17

Student Public Interest Research Group v. Monsanto Co., 18 Envtl. L. Rep. 20,999, 1988 WL 156691 (D.N.J. 1988) 16

Sullivan v. Louisiana, 508 U.S. 275 (1993) 17

Union Elec. Co. v. EPA, 427 U.S. 246 (1976) 9-10

Union Elec. Co. v. EPA,
593 F.2d 299 (8th Cir. 1979),
cert. denied, 444 U.S. 839 (1979) 10-11

United States v. AT&T,
83 F.R.D. 323 (D.D.C. 1979) 18,19-20

United States v. B&W Inv. Props.,
38 F.3d 362 (7th Cir. 1994),
cert. denied, 514 U.S. 1126 (1995) 16-17

United States v. Ethyl Corp.,
761 F.2d 1153 (5th Cir. 1985),
cert. denied, 474 U.S. 1070 (1986) 10

United States v. J.B. Williams Co.,
498 F.2d 414 (2d Cir. 1974) 18

United States v. Jin Fuey Moy,
241 U.S. 394 (1916) 12

United States v. Marine Shale Processors,
81 F.3d 1329 (5th Cir. 1996) 16

United States v. Midwest Suspension and Brake,
824 F. Supp. 713 (E.D. Mich. 1993),
aff'd, 49 F.3d 1197 (6th Cir. 1995) 16

United States v. Saade,
652 F.2d 1126 (1st Cir. 1981) 14

United States v. Sagner,
71 F. Supp. 52 (D. Or. 1947),
rev'd on other grounds, 331 U.S. 791 (1947) 14

United States v. Smithfield Foods, Inc.,
972 F. Supp. 338 (E.D. Va. 1997) 16

Virginia Military Institute v. United States,
508 U.S. 946 (1993) 9

Walton v. United Consumers Club, Inc.,
786 F.2d 303 (7th Cir. 1986) 19

Western Oil & Gas Ass'n v. Air Resources Bd.,
691 P.2d 606 (Cal. 1984) 9

Yakus v. United States,
321 U.S. 414 (1944) 13

STATUTES, REGULATIONS AND RULES:

5 U.S.C. § 553(c) 11

5 U.S.C. § 703 11

28 U.S.C. § 1254 3

42 U.S.C. § 1857h-5 (repealed and recodified) 10

42 U.S.C. § 7401 *et seq.* 4

42 U.S.C. § 7410 3-5

42 U.S.C. § 7413 3,4,6,15

42 U.S.C. § 7414 6

42 U.S.C. § 7607 3,8-14

Fed. R. Civ. P. 43(a) 4,18-20

S. Ct. Rule 30.1 3

50 Fed. Reg. 3338 (Jan. 24, 1985) 5

54 Fed. Reg. 5236 (Feb. 2, 1989) 5

Cal. Health & Safety Code § 40000 *et seq.* 5

Cal. Health & Safety Code § 40440 9

SECONDARY SOURCES:

D. Currie, *Judicial Review Under Federal Pollution Laws*, 62 Iowa L. Rev. 1221 (1977) 14

Note, *Increased Judicial Scrutiny of Administrative Crime*, 77 Cornell L. Rev. 612 (1992) 14

Recommendation of the Administrative Conference, 41 Fed. Reg. 56768 (1976) 14

C. Richey, *A Modern Management Technique for Trial Courts to Improve the Quality of Justice: Requiring Direct Testimony to Be Submitted in Written Form Prior to Trial*, 72 Geo. L.J. 73 (1983) 19

R. Stern *et al.*, *Supreme Court Practice* (7th ed. 1993) 9

P. Verkuil, *Congressional Limitations of Judicial Review of Rules*, 57 Tulane L. Rev. 733 (1982-83) 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

VISTA PAINT CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

The ultimate purpose of the separation of powers, this Court has often stated, is "to protect the liberty and security of the governed." *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991). This case presents the question whether this statement is true as a practical matter or simply rhetoric. The Legislative, Executive, and Judicial Branches of the Federal Government have come together in this case to impose a penalty of more than a *million* dollars on the owner of a small, family-run business. Congress enacted a statute, the Clean Air Act, that authorizes such crushing penalties and limits citizens' ability to contest them in judicial proceedings. The Environmental Protection Agency ("EPA") deployed the full brunt of its enforcement powers against petitioner. And, most disturbing of all, the lower courts gave petitioner the back of the hand, limiting its ability to contest the penalty by denying

traditional and fundamental procedural protections. The lower courts in this case essentially abdicated their role as guardians of liberty, and instead operated as a claims-processing arm of the administrative state. This Court should not allow a perceived need for administrative efficiency to override the core protections of the judicial system.

In particular, the courts below stacked the deck against petitioner in three ways. *First*, the lower courts precluded petitioner from challenging the validity of the very environmental standard being enforced, on the ground that only a *pre*-enforcement challenge could be entertained. *Second*, the lower courts refused to impose on the Government the burden of proof with respect to the appropriate penalty, and essentially required petitioner to carry the burden of proving why the maximum possible penalty should *not* be imposed. *Third*, the lower courts subjected petitioner to a "trial by affidavit," requiring petitioner to present its case in the form of written affidavits submitted simultaneously with affidavits from the Government. Each of these three rulings is incorrect and unfair, and each conflicts with rulings from other federal courts. For these reasons, and to underscore that the federal courts are more than rubber-stamps for administrative enforcement decisions, this Court's review is warranted.

OPINIONS BELOW

The Ninth Circuit's decision below can be found at 129 F.3d 129 (1997) (Table), 1997 WL 697295, and is reprinted in the Appendix ("App.") at 1a-2a. The order denying a petition for rehearing and suggestion for rehearing *en banc* is reprinted at App. 3a. The District Court's unreported opinion below can be found at 1996 WL 477053, and is reprinted at App. 4a-33a.

The Ninth Circuit's decision in the first round of this litigation can be found at 976 F.2d 739 (1992) (Table), 1992 WL 236898, and is reprinted at App. 34a-45a. This Court denied a petition for writ of *certiorari* from that decision on October 4, 1993. *See* 510 U.S. 826 (1993).

JURISDICTION

The Ninth Circuit entered the judgment below on November 4, 1997, *see* App. 1a, and denied petitioner's timely petition for rehearing and suggestion for rehearing *en banc* on January 23, 1998, *see id.* at 3a. Justice O'Connor granted an extension of time for filing this petition to and including May 23, 1998. Because that day is a Saturday, and May 25, 1998, is a federal holiday, this petition is timely filed on May 26, 1998. *See* S. Ct. Rule 30.1. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

Section 113(e)(1) of the Clean Air Act, 42 U.S.C. § 7413(e), provides, in relevant part, as follows:

> In determining the amount of any penalty to be assessed under this section . . . the court . . . shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of non-compliance, and the seriousness of the violation . . . .

Section 307(b) of the Clean Air Act, 42 U.S.C. § 7607(b), provides, in relevant part, as follows:

> (1) A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title . . . which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit . . . . Any petition for review under this subsection shall be filed within sixty days from the date notice of such

> promulgation, approval or action appears in the Federal Register . . . .
>
> (2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement . . . .

The version of Fed. R. Civ. P. 43(a) applicable to the trial below provides as follows:

> In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court.

STATEMENT OF THE CASE

A. Background of the Alleged Violations

Vista is a small, family-run paint business founded in 1957 by its owner and president, Eddie Fischer. *See* App. 46a. At the time of trial, Fischer operated a single factory in Fullerton, California, maintained 28 retail stores in Southern California, and manufactured and sold about 300,000 gallons of paint each year. *See id.* at 17a-18a. Prior to this case, Vista had a perfect record of compliance with all applicable laws. *See id.* at 16a, 40a.

The Clean Air Act, 42 U.S.C. § 7401 *et seq.*, gives the States primary responsibility for regulating air pollution. A State must develop a State Implementation Plan ("SIP") for enforcing the Act within its borders, and then submit that SIP to the EPA for approval. *See* 42 U.S.C. § 7410. Once the SIP is approved by the EPA, it becomes federal law. *See* 42 U.S.C. § 7413. A State can modify a federally approved SIP by submitting a revision, which the EPA can either deny, conditionally approve, or fully approve. *See* 42 U.S.C. § 7410(k)-(l).

The State of California, in turn, has delegated primary responsibility for enforcing the Clean Air Act to local "air quality districts," which have the authority under state law to promulgate their own rules. *See* Cal. Health & Safety Code § 40000 *et seq.* In 1984, two local air quality districts in which Vista sells paint adopted rules mandating a drastic reduction in the volatile organic compound ("VOC") content of certain paints. *See* App. at 5a, 71a. In practical effect, these new standards required Vista and other manufacturers to reduce the amount of thinners and solvents in their paint. *See id.* at 48a-49a. These standards were approved by the EPA as part of the California SIP in early 1985. *See* 50 Fed. Reg. 3338 (Jan. 24, 1985).

The State of California, however, postponed the effective dates of the stringent VOC standards, and twice petitioned the EPA to revise the federally approved SIP to postpone their effective dates as a matter of federal law as well. *See id.* at 20a. The EPA never acted on one petition, and ultimately denied the other some *four years* later, in early 1989, shortly before the requested postponement would have expired in any event. *See id.*; *see also* 54 Fed. Reg. 5236 (Feb. 2, 1989).

Meanwhile, in May 1987, the EPA sent information requests under the Clean Air Act to Vista and many other manufacturers. *See* App. at 7a-8a, 50a-51a. The EPA thereafter issued Vista notices of violation with regard to the VOC standards, including standards that had never been implemented under California law. *See id.* at 8a, 20a-21a, 52a, 57a.

B. The First Trial and Appeal

In December 1990, the EPA filed this civil penalty action against Vista. *See id.* at 73-79a. In particular, the agency contended that the company had violated the Clean Air Act by (1) selling paint that did not meet the stringent VOC standards incorporated in the California SIP, *see* 42 U.S.C. § 7410, and

(2) failing to comply with the statutory reporting provisions, *see* 42 U.S.C. § 7414. *See also* App. at 76a-77a.

Vista sought to defend itself on the ground, among others, that the VOC standards contained in the federally approved SIP were invalid because they had been promulgated in violation of California law. This argument was based on a number of irregularities, including the fact that the VOC standards were technologically and economically infeasible, at least as applied to a small business like Vista.

The District Court (Real, J.) rejected this defense, holding that a federally approved SIP could not be challenged in an enforcement proceeding, but only in a *pre*-enforcement challenge to the adoption of the SIP. *See* App. 91a-92a. Without changing a word in the EPA's proposed findings of fact and conclusions of law, Judge Real entered summary judgment against Vista, ordering the company to pay over *$3 million* in penalties. *See* App. 69a-72a. The Judge provided no analysis of conflicting evidence relating to the mandatory penalty factors set forth in the Clean Air Act. *See* 42 U.S.C. 7413(e).

Vista appealed to the Ninth Circuit, claiming, *inter alia*, that the District Court had erred by (1) precluding the company from challenging the validity of the very standards being enforced, and (2) summarily awarding a penalty without consideration of the statutory penalty factors. The Court of Appeals affirmed the District Court's refusal to entertain a challenge to the validity of the VOC standards, *see id.* at 36a, but reversed the summary penalty and remanded for a new trial on the appropriate penalty (if any), *see id.* at 45a. Vista then filed an unsuccessful interlocutory petition for *certiorari* on the first issue. *See* 510 U.S. 826.

C. The Second Trial and Appeal

The case on remand was assigned first to Judge Tashima, and then (after Judge Tashima's elevation to the Ninth Circuit) to Judge Timlin. Two pretrial rulings are critical here. *First*,

the District Court rejected Vista's argument that the Government bore the burden of proof with respect to any facts underlying the application of the statutory penalty factors. *See* App. at 86a-88a. Ruling from the bench, Judge Timlin asserted that "there's no burden of proof in this particular trial," *id.* at 87a, and later amplified on this ruling by holding that "[t]his Court will first determine the maximum penalty allowable and then consider any mitigating circumstances," *id.* at 22a.

Second, the District Court ordered the trial to be structured in a most unorthodox manner. The court required both parties to present their case-in-chief *solely* through written affidavits submitted simultaneously, and precluded either party from relying on live testimony as part of its case-in-chief. *See id.* at 66a, 80a-84a. Judge Timlin acknowledged the novelty of these procedures (which originally had been ordered by Judge Tashima), but refused to revisit the prior procedural rulings. "[T]his is my first experience with evidence on declarations simultaneously filed. This is a classic pilot program for reconsideration of allowing testimony by declarations. But that's the way it is." *Id.* at 83a.

Pursuant to these procedures, Vista and the EPA presented their cases-in-chief by exchanging written affidavits in May 1994. *See id.* at 81a. A year later, in May 1995, Judge Timlin held a "trial" to allow limited cross-examination by both sides. *See id.* at 82a, 85a. Almost another year later, in April 1996, the Court issued an order imposing a penalty of $1,111,250. *See id.* at 33a.

Vista appealed to the Ninth Circuit for a second time, challenging (1) the District Court's failure to impose the burden of proof on the Government, and (2) the District Court's novel procedures. The Ninth Circuit, however, affirmed in a one sentence order. *See id.* at 1a-2a. This petition follows.

REASONS FOR GRANTING THE WRIT

I. The Courts Below Erred in Precluding Vista From Challenging the Validity of a Regulation in a Proceeding to Enforce that Regulation.

Prior to this Court's decision in *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967), it was settled that a regulated party generally could not challenge a regulation *prior* to enforcement, on the ground that such a challenge was not yet "ripe." *See, e.g., FPC v. Metropolitan Edison Co.*, 304 U.S. 375, 383-85 (1938). *Abbott Labs* lifted that absolute barrier, holding that pre-enforcement review may be appropriate where the issues are sufficiently concrete for judicial resolution and the challenged regulation would have a direct and immediate pre-enforcement effect on the regulated party. *See* 387 U.S. at 148-56. Over the ensuing decade, Congress moved swiftly to transform this limited exception into the rule. Important new statutes *required* regulated parties to challenge a regulation prior to its enforcement, and *precluded* them from raising such a challenge when the regulation was actually enforced against them.

The Clean Air Act is one such statute. Section 307(b)(1) of the Act authorizes regulated parties to challenge the EPA's adoption of a SIP within 60 days after the appearance of notice in the Federal Register. *See* 42 U.S.C. § 7607(b)(1). Section 307(b)(2), in turn, provides that "[a]ction of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement." 42 U.S.C. § 7607(b)(2).

This case presents the questions (1) whether these provisions preclude a challenge to a federally approved SIP based on economic or technological infeasibility, and, if so, (2) whether these provisions are constitutional. Both these questions have vexed and divided courts and commentators. The first question was expressly noted, but left unresolved, by this Court in

Union Elec. Co. v. EPA, 427 U.S. 246, 268 n.18 (1976). The second question was raised, but left unresolved, in concurrences by Justice Powell in *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 594-95 (1980), and *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 289-91 (1978), and has been the subject of great interest among the lower courts and commentators. This Court should grant review here to resolve these important and unsettled issues of federal law.[1]

A. Section 307(b)(2) Does Not Preclude Vista's Challenge to the California SIP.

Vista argued below that the VOC standards included in the California SIP — the very standards on which the EPA bases this enforcement action — are invalid on several grounds under California law. Among these grounds are claims relating to economic and/or technological infeasibility, which are factors that local air quality districts in California must consider under state law when promulgating standards. Thus, for example, the "control measures" imposed by a local air quality district must be "efficient and cost-effective." Cal. Health & Safety Code § 40440. In addition, a local air quality district must assess and duly consider the economic impact of its standards. *See Western Oil & Gas Ass'n v. Air Resources Bd.*, 691 P.2d 606, 608 (Cal. 1984). Vista was precluded from raising either of these two challenges to the VOC standards below, even though it could not have raised such challenges involving economic and/or technological feasibility in a direct challenge to the EPA's adoption of the California SIP. *See Union Elec. Co.*, 427 U.S. at 256 ("[C]laims of economic and technological

---

[1] No significance can be attached to the fact that Vista's interlocutory petition for *certiorari* raising these issues was denied in 1993. This Court "generally await[s] final judgment in the lower courts before exercising [its] *certiorari* jurisdiction." *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (statement of Scalia, J., respecting denial of *certiorari*) (collecting cases); *see generally* R. Stern *et al.*, *Supreme Court Practice* § 4.18 at pp. 195-98 (7th ed. 1993).

infeasibility [are] wholly foreign to the Administrator's consideration of a state implementation plan.").

Both the District Court and the Ninth Circuit, however, held that Vista was precluded from challenging the validity of the VOC standards in this enforcement proceeding on the ground that it had not mounted a pre-enforcement challenge to those standards. *See* App. at 36a. Vista had "ample opportunity," the Ninth Circuit asserted (without citation), to challenge those standards when the EPA adopted the California SIP. *Id.* The Ninth Circuit thus joined the Third Circuit in broadly construing § 307(b)(2) of the Clean Air Act to preclude all challenges to the validity of a SIP, even where (as here) those challenges involve economic and/or technological infeasibility. *See Getty E. Oil Co. v. Ruckelshaus*, 467 F.2d 349, 355-56 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *see also United States v. Ethyl Corp.*, 761 F.2d 1153, 1155-58 (5th Cir. 1985) (broadly holding that § 307(b)(2) precludes all enforcement challenges to a federally approved SIP), *cert. denied*, 474 U.S. 1070 (1986); *Lubrizol Corp. v. EPA*, 562 F.2d 807, 813-15 (D.C. Cir. 1977) (same); *Friends of the Earth v. Carey*, 552 F.2d 25, 34-35 (2d Cir. 1977) (same).[2]

Three other circuits, in contrast, have recognized that challenges based on economic and/or technological infeasibility cannot be raised in a petition for direct review, and hence may properly be raised as a defense to an enforcement proceeding. *See Lloyd A. Fry Roofing Co. v. EPA*, 554 F.2d 885, 891 (8th Cir. 1977); *Indiana & Mich. Elec. Co. v. EPA*, 509 F.2d 839, 845 (7th Cir. 1975); *Buckeye Power, Inc. v. EPA*, 481 F.2d 162, 172-73 (6th Cir. 1973); *cf. Union Elec. Co. v. EPA*, 593 F.2d 299, 304 (8th Cir. 1979) ("[A] company seeking to have these issues reviewed . . . could present its

---

[2] Some of these cases refer to the previous codification of § 307(b)(2) in 42 U.S.C. § 1857h-5(b)(2). Although the time period for filing petitions for review under this provision has increased, the substance of the provision has otherwise remained unchanged.

cause as a defense to any enforcement proceedings initiated by the EPA in federal district court."), *cert. denied*, 444 U.S. 839 (1979). These courts recognize that claims of economic and technological infeasibility are beyond the EPA's authority to consider in the SIP approval process, and thus are outside of the preclusive scope of § 307(b)(2) by that provision's very terms.

To determine whether a SIP was technologically and/or economically feasible, the Sixth Circuit explained, would require a hearing "on the record" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 553(c), whereas the SIP review process is not a formal, "on the record" rulemaking. *Buckeye Power*, 481 F.2d at 172-73. In addition, the Sixth Circuit noted, the judicial review provisions of the Administrative Procedure Act expressly authorize judicial review of agency action "in civil or criminal proceedings for enforcement" except "to the extent that prior, *adequate*, and exclusive opportunity for judicial review is provided by law." 5 U.S.C. § 703 (emphasis added). "Since we have determined that there could not have been an adequate hearing on individual claims such as those presented by petitioners herein prior to approval of the state plans, the claims can be asserted as a defense in either federal or state enforcement proceedings." *Buckeye Power*, 481 F.2d at 173.

The interpretation of § 307(b)(2) advanced by the Sixth, Seventh, and Eighth Circuits comports with traditional principles of statutory construction. Because judicial review is vital to the legitimacy of administrative action, this Court traditionally has given a very narrow reading to provisions limiting such review. *See, e.g., McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991). Indeed, in *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978), this Court went out of its way to avoid construing § 307(b)(2) to preclude a challenge to an EPA-approved emission standard in an enforcement proceeding. Invoking the rule of lenity, the Court concluded that the standard at issue was not, in fact, an

"emission standard" within the meaning of the Clean Air Act and thus was outside the scope of § 307(b)(2). *Id.* at 278-89.

The Court should now resolve this division in the lower courts and clarify the circumstances, if any, under which § 307(b)(2) of the Clean Air Act allows regulated parties to challenge the validity of an EPA-approved SIP in an enforcement proceeding.

B. If Construed to Preclude Vista's Challenge to the California SIP, Section 307(b)(2) is Unconstitutional.

A cardinal reason to construe § 307(b)(2) to authorize Vista's challenge to the validity of the VOC standards in this enforcement proceeding is that a contrary construction of that provision would be unconstitutional — or, at the very least, raise very serious constitutional doubts. *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trade Council*, 485 U.S. 568, 575 (1988); *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916); *see also Ashwander v. TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

The constitutional issue presented by § 307(b)(2) is stark: can a defendant in a regulatory enforcement proceeding be denied the opportunity to present a defense? The "fundamental requirement of due process is the opportunity to heard . . . in a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). For a defendant in a civil (or criminal) enforcement proceeding, the most meaningful time to be heard is obviously during the course of such a proceeding, not at the earlier time when the regulation is first included in a SIP, when the precise interests of all who might be affected are hypothetical and unfocused. Absent extraordinary circumstances, to preclude a defendant in an enforcement proceeding from challenging the validity of the very regulation being enforced is to deny due process. *Cf. General Motors Corp. v. Ruckelshaus*, 724 F.2d 979, 984 n.30 (D.C. Cir. 1983) (Section 307(b)(2) presents constitutional

problems that have not yet been resolved), *vacated on other grounds*, 742 F.2d 1561 (D.C. Cir. 1984) (*en banc*), *cert. denied*, 471 U.S. 1074 (1985); *Chrysler Corp. v. EPA*, 600 F.2d 904, 912 (D.C. Cir. 1979) (noting "[t]he nagging presence of a substantial due process question" presented by § 307(b)(2)).

It is no answer to say that the regulated party could have mounted a *pre*-enforcement challenge. Pre-enforcement challenges, as noted above, have always been the exception, rather than the rule, in our legal system. *See, e.g., New England Tel. & Tel. Co. v. Public Util. Comm'n of Me.*, 742 F.2d 1, 7 (1st Cir. 1984) (Breyer, J.), *cert. denied*, 476 U.S. 1174 (1986). The opportunity to challenge a regulation at the time the EPA adopts a SIP is no opportunity at all, as most potential targets of that regulation are unaware that it may eventually be enforced against them. Vista, for one, does not (and cannot afford to) pay a staff of lawyers to comb through the Federal Register every day to see if any of its interests might be affected by revisions to a SIP. As Justice Powell has explained, it "is totally unrealistic to assume that more than a fraction of the persons and entities affected by a regulation — especially small contractors scattered across the country — would have knowledge of [a regulation's] promulgation, or familiarity with or access to the Federal Register." *Adamo Wrecking*, 434 U.S. at 289-91 (concurring opinion); *see also Holmes Limestone Co. v. Andrus*, 655 F.2d 732, 740-41 (6th Cir. 1981) (Merritt, J., concurring) (echoing Justice Powell's notice concerns), *cert. denied,* 456 U.S. 995 (1982). Vista, like any other regulated party, should be allowed to defend itself when its interests in the validity of a regulation become concrete: *when the regulation is enforced against it.*

Only once has this Court upheld a limitation on the right to present an effective defense as substantial as the limitation set forth in § 307(b)(2) of the Clean Air Act. In *Yakus v. United States*, 321 U.S. 414 (1944), this Court upheld the validity of the Emergency Price Control Act enacted during the Second World War, which limited judicial review of price controls to

pre-enforcement challenges, and precluded any challenge to the validity of a price control during an enforcement proceeding.

It remains an open question, however, whether *Yakus* applies outside the unique factual context of wartime price controls. *See Adamo Wrecking*, 434 U.S. at 289-90 (Powell, J., concurring); *United States v. Saade*, 652 F.2d 1126, 1133 n.9 (1st Cir. 1981); Note, *Increased Judicial Scrutiny of Administrative Crime*, 77 Cornell L. Rev. 612, 633 (1992) (characterizing *Adamo Wrecking* as an example of judicial "sleight of hand" to avoid addressing *Yakus*' continuing validity or scope). There is simply no basis for extending the extraordinary wartime holding in *Yakus* to uphold the validity of a provision like § 307(b)(2) precluding enforcement challenges of peacetime environmental regulation. *See, e.g., United States v. Sagner*, 71 F. Supp. 52, 53 (D. Or. 1947) (predicting that "solid part of the bar" will eventually request reconsideration of *Yakus*), *rev'd on other grounds*, 331 U.S. 791 (1947); Recommendation of the Administrative Conference, 41 Fed. Reg. 56768 (1976) ("The express preclusion of review at the enforcement stage creates a highly unusual and unnecessarily harsh restriction on the right to challenge the validity of a regulation to which one is subject."); D. Currie, *Judicial Review Under Federal Pollution Laws*, 62 Iowa L. Rev. 1221, 1258-60 (1977) (criticizing constitutionality and policy basis of § 307(b)(2)).

By transforming the narrow *Yakus* exception of limited judicial review of enforcement proceedings into the rule, Congress has unconstitutionally stacked the deck against regulated parties like Vista. It is high time for this Court to underscore the limited scope of *Yakus*, or overrule that decision altogether. As Professor Verkuil has noted, failure to resolve definitively the constitutional vitality and scope of *Yakus* merely "causes an unnecessary loss of time and a waste of decision resources for all three branches of government." P. Verkuil, *Congressional Limitations of Judicial Review of Rules*, 57 Tulane L. Rev. 733, 772 (1982-83).

II. The Courts Below Erred in Holding that the Government Does Not Bear the Burden of Proof with Regard to Penalty Factors Under the Clean Air Act.

On remand from the Ninth Circuit to reconsider the appropriate penalty (if any) to be assessed against Vista, the District Court refused to place on the Government the burden of proving the facts underlying the various statutory penalty factors. According to the District Court, "there's *no burden of proof* in this particular trial." App. 87a (emphasis added). The Court then proceeded, if anything, to put the burden on *Vista* to prove that any penalty less than the maximum was warranted. "This Court will first determine the maximum penalty allowable and then consider any mitigating circumstances." App. 22a. These holdings are plainly erroneous: there *is* a burden of proof with regard to proof of penalty factors in Clean Air Act enforcement actions, and that burden rests squarely on the Government. The District Court's improper allocation of the burden of proof infected the entire proceeding.

Section 113(e)(1) of the Act, 42 U.S.C. § 7413(e)(1), requires a court assessing the amount of a statutory penalty to consider various factors, including the size of the defendant's business, the economic impact of the penalty on that business, and the defendant's compliance history. In order to assess these factors, of course, the court first must find the underlying facts. *See Atlantic States Legal Found. v. Tyson Foods*, 897 F.2d 1128, 1142 (11th Cir. 1990) (district court must "clearly indicat[e] the weight it gives to each of the factors in the statute and the factual findings that support its conclusions"); *see also Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 573 (5th Cir.), *cert. denied*, 117 S. Ct. 57 (1996); *Public Interest Research Group v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 79 (3d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991). And, to find facts, the district court must allocate a burden of proof. *See, e.g., Engle v. Isaac*, 456 U.S. 107, 118 (1982). There is no

basis in law or logic for the District Court's conclusion that "there's no burden of proof" in a proceeding to determine the appropriate penalty (if any) for a violation of the Clean Air Act.

Where, as here, the Government seeks to exact a penalty, it must carry the burden of proving that the penalty is justified. Our legal system rests on a "presumption in favor of freedom." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 320 (1993) (Stevens, J., concurring in judgment). Absent explicit statutory command (and there is none in the Clean Air Act), the *Government* should bear the burden of proving facts to justify the appropriate penalty (if any); the *defendant* should not be saddled with the burden of proving facts to *rebut* the maximum penalty requested by the Government. *See, e.g., United States v. Midwest Suspension and Brake*, 824 F. Supp. 713, 735 n. 30 (E.D. Mich. 1993), *aff'd*, 49 F.3d 1197 (6th Cir. 1995); *United States v. Smithfield Foods, Inc.*, 972 F. Supp. 338 (E.D. Va. 1997); *Student Public Interest Research Group v. Monsanto Co.*, 18 Envtl. L. Rep. 20,999, 1988 WL 156691 (D.N.J. 1988). As the *Monsanto* court explained:

> I expressly reject [the Government's] argument that, in setting a penalty, the court should place the burden on the on the defendant to establish facts that justify some amount less than the maximum allowed by law. That would, in my view, be a novel and wholly untenable principle to apply to any civil penalty statute.

Monsanto, 18 Envtl. L. Rep. 20,999, 1988 WL 156691, at *16.

Other courts, however, agree with the lower courts in this case that a district court should presumptively apply the maximum penalty and require a defendant to prove facts in mitigation. *See, e.g., United States v. Marine Shale Processors*, 81 F.3d 1329, 1337 (5th Cir. 1996); *Leslie Salt Co. v. U.S.*, 55 F.3d 1388 (9th Cir.), *cert. denied*, 516 U.S. 955 (1995); *United States v. B&W Inv. Props.*, 38 F.3d 362, 368

(7th Cir. 1994), *cert. denied*, 514 U.S. 1126 (1995); *Atlantic States Legal Found.*, 897 F.2d at 1142 (same).

The Court should resolve this conflict of authority on such an important issue of federal law. By refusing to place squarely on the Government the burden of proving the facts underlying the penalty factors, and by requiring the defendant to prove facts in mitigation of the maximum penalty, the District Court improperly stacked the deck against Vista. The allocation of the burden of proof is no technicality; it influences the entire fact-finding process. "In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome." *Speiser v. Randall*, 357 U.S. 513, 525 (1958); *see also Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986) ("burden of proof is dispositive" when fact-finder cannot otherwise resolve an issue conclusively). Indeed, as this Court has explained, a misallocation of the burden of proof can "vitiat[e]" all factual findings. *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993).

III. The Abbreviated Penalty Trial Afforded to Petitioner Did Not Comport with the Federal Rules of Civil Procedure or the Constitution.

The "trial" held on remand below was nothing of the sort. Rather than (1) requiring the EPA to put on its case first, present its witnesses, and subject those witnesses to cross-examination, and then (2) allowing Vista to put on its own case, the District Court ruled both the Government and Vista should simultaneously submit their cases-in-chief in the form of written affidavits. The Court then gave a nod toward traditional practice by allowing the parties to cross-examine adverse witnesses in open court. This peculiar procedure, which even the District Court characterized as novel, App. at 83a, bears no resemblance to the procedure required by the Federal Rules of Civil Procedure or the Constitution. Although district courts surely enjoy a measure of discretion in structuring their proceedings, they do not have discretion to dispense with bedrock procedural rules. The District Court

here raised concerns of administrative efficiency above concerns for fundamental fairness. This Court should not tolerate this assembly-line approach to justice.

In particular, the District Court's novel procedure violated Rule 43(a) of the Federal Rules of Civil Procedure, which, at the time of trial, provided that "[i]n *all* trials the *testimony of witnesses* shall be taken orally in *open court*, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court." Fed. R. Civ. P. 43(a) (emphasis added).[3] The text of the Rule could not be clearer. The "testimony of witnesses" must be delivered "in open court." Trials by affidavit are not permissible.

Indeed, previous attempts to dispense with the testimony by witnesses in open court have been rebuffed by courts sensitive to the command of Rule 43(a) and the Constitution. "It is not within the province of the court to resolve issues of disputed fact in a trial by affidavit." *Ross v. Franzen*, 777 F.2d 1216, 1220 (7th Cir. 1985); *see also Dolence v. Flynn*, 628 F.2d 1280, 1281 (10th Cir. 1980) (*per curiam*); *United States v. J.B. Williams Co.*, 498 F.2d 414, 430 n.19 (2d Cir. 1974). Judicial convenience cannot justify a contrary result. Thus, in *United States v. AT&T*, 83 F.R.D. 323, 339 & n.46 (D.D.C. 1979) — surely a complicated case if ever there was one — Judge Greene rejected a proposal to proceed by affidavits rather than live testimony. As the Judge explained, Rule 43(a) authorized no such departure from "the historic practice of courts of this

---

[3] The word "orally" was deleted as part of a series of technical amendments effective April 23, 1996, but those amendments were not intended to have any substantive effect. As explained by the Advisory Committee notes accompanying the amended Rule, the word "orally" was deleted to accommodate witnesses who are "not able to communicate orally," and therefore need to communicate through other means, such as "writing or sign language." The amendment in no way purported to dispense with the requirement to present the "the testimony of witnesses . . . in open court" or otherwise authorize trials by affidavit.

nation" absent an unequivocal command. *Id.* at 339. Neither the statute at issue there, nor the Clean Air Act at issue here, provides any such command.

In light of the plain text of Rule 43(a), it goes without saying that courts have no "inherent power" to dispense with the "testimony of witnesses" presented "in open court" in favor of trial by affidavit. Whatever the scope of such power, it plainly cannot trump the clear limitation established by the Rule. *See, e.g., Carlisle v. United States*, 517 U.S. 416, 426 (1996). "[F]ederal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254-255 (1988).

Despite the clarity of Rule 43(a), many courts (like the courts below) have held that it is permissible to receive evidence in written form as long as it is later subject to cross-examination. *See, e.g., Bellaire Gen. Hosp. v. Blue Cross Blue Shield*, 97 F.3d 822, 826-28 (5th Cir. 1996); *Ball v. Interoceanica Corp.*, 71 F.3d 73, 77 (2d Cir. 1995), *cert. denied*, 117 S. Ct. 169 (1996); *In re Adair*, 965 F.2d 777, 779-80 (9th Cir. 1992) (*per curiam*); *Phonetele, Inc. v. AT&T*, 889 F.2d 224, 232 (9th Cir. 1989), *cert. denied*, 503 U.S. 914 (1992); *In re Stevinson*, 194 B.R. 509, 511-12 (D. Colo. 1996); *see also* Hon. Charles Richey, *A Modern Management Technique for Trial Courts to Improve the Quality of Justice: Requiring Direct Testimony to Be Submitted in Written Form Prior to Trial*, 72 Geo. L.J. 73 (1983). The Ninth Circuit has succinctly summarized the reasoning of these courts in authorizing departures from traditional procedures: "The use of written testimony is an accepted and encouraged technique for shortening bench trials." *Phonetele*, 889 F.2d at 232.

Other courts, however, have neither "accepted" nor "encouraged" this aberrant approach. *See Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 313 (7th Cir. 1986) (Easterbrook, J.); *Lebeck v. William A. Jarvis, Inc.*, 250 F.2d 285, 294-95 (3d Cir. 1957); *AT&T*, 83 F.R.D. at 339 & n.46

("The Court has found no provision in the Rules to contradict the express mandate of Rule 43(a)."); *see also Eccles v. People's Bank of Lakewood Village*, 333 U.S. 426, 434 (1948) (Frankfurter, J.) ("Modern equity practice has tended away from a procedure based on affidavits and interrogatories, because of its proven insufficiencies.").

This Court should grant review here to resolve this split of authority and to reaffirm the traditional right, codified in Rule 43(a), to have factual disputes tried on the basis of "the testimony of witnesses . . . in open court."

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

WILLIAM F. FAHEY
HANNA & MORTON •
THORPE & THORPE
Wilshire-Grand Building
17th Floor
600 Wilshire Boulevard
Los Angeles, CA 90017

CHRISTOPHER LANDAU
Counsel of Record
JEFFREY BOSSERT CLARK
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

Counsel for Petitioner